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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 264

WILLIAM F. DROHAN and DANIEL D. CARMELL, as Trustees for Keeshin Motor Express Co., Inc., in Reorganization Cause 46-B-26 Northeast District of Illinois,

Plaintiffs-Respondents,

vs.

STANDARD OIL COMPANY, a corporation,

Defendant-Petitioner.

STANDARD OIL COMPANY, a corporation,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., a corporation; and C. A. CONKLIN TRUCK LINE, INC., a corporation,

Cross-Defendants-Respondents.

MARTHA NICHOLS, as Administratrix of the Estate of Ferris Nichols, deceased,

Cross-Claimant-Petitioner,

vs.

KEESHIN MOTOR EXPRESS CO., INC., a corporation; and C. A. CONKLIN TRUCK LINE, INC., a corporation,

Cross-Defendants-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your Respondents, William F. Drohan and Daniel D. Carmell, as Trustees for Keeshin Motor Express Co., Inc., in Reorganization Cause 46-B-26, Northwest District of Illinois, as Plaintiffs-Respondents respectfully respond in opposition to the petition of the Standard Oil Company, a corporation and Martha Nichols, as Administratrix of the Estate of Ferris Nichols, deceased, for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

In the interest of brevity Respondents adopt the abbreviations as set forth in petitioners' petition on page 2.

ARGUMENT.

I.

The question is not an important question of local law.

Since only the propriety of two instructions is involved in this application for a Writ of Certiorari, no real qualifying basis exists to recommend the instant case to this court for review. Instructions must perforce be characterized and limited by the special facts under consideration and in the light of the issues on trial and the evidence introduced to support them. The Circuit Court of Appeals after studying all the instructions involved in this case felt that the given instructions properly and fully announced the correct propositions of law applicable to this case. Both instructions questioned have been approved in substance by the Supreme Court of Indiana. Instructions are to be read as a series and it would be uncomplimentary to your Honor's legal back ground to cite authorities enunciating that academic proposition of law.

The so-called important legal propositions are only imagined and have no actual existence. At this juncture we respectfully call this court's attention not only to the decision itself but to page 11, footnote 5 where the Petitioners indulge in some fancy hair splitting when they state "However, in this case, the opinion of the Circuit Court of Appeals is so written that it appears on its face to adhere to the rules of decision of the State of Indiana. Therefore it becomes essential to demonstrate to this court that such is not the fact, and that since the opinion, two divergent and conflicting rules exist."

We do not care about demonstrations and surely with the ever increasng volume of litigation, this Court does not

have the time to find distinctions in things that admit of no distinction. The following statement appearing in 48 Har. Law Review 269 under the title "The Business of the Supreme Court at October Term, 1933" adequately evaluates the limitations of certiorari:

> "As to probable conflict with local decisions, for the most part the "important questions of local law" urged by practitioners are questions as to the law of master and servant in negligence cases, and the like. [This case involves only two instructions.] Diversity of citizenship jurisdiction is the great feeder of such controversies. For the bulk of ordinary private litigation arising from that jurisdiction the circuit courts of appeals are, and must be courts of last resort, tribunals of final authority as to the law of states which lie within their circuit. This is not to say that the correct decision of such cases is not important; it is only to say that the importance is of a different quality. The Supreme Court cannot undertake to see that every case in a Federal Court is decided as a State Court would have decided it. At best it must confine its interposition to cases in which a circuit court of appeals has announced a rule, potentially governing a substantial number of other cases in conflict with a rule announced by authoritative State Court decisions."

However, in the instant case no different result would have been obtained had the case been tried in the State Court and we have no quarrel with the propositions of law advanced in *Erie* v. *Tompkins,* 304 U. S. 64, 50 S. Ct. 817, *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 65, S. Ct. 1464 or the case of *Fidelity Union Trust Co.* v. *Field,* although these decisions have no application to the case at bar because the Circuit Court of Appeals did not decide important questions of law in conflict with applicable decisions of the State of Indiana.

II.

The Circuit Court of Appeals did not decide a question of local law in conflict with applicable decisions.

(a)

The instruction that the operator of the Standard Vehicle was "To regularly and continuously observe the highway ahead of him so as to discover any vehicle or other conveyance on the highway" correctly embodied the law of the State of Indiana.

The instruction is set forth (R. 208) and the Circuit Court of Appeals in upholding such instruction stated (R. 295),

> "It is clear that the language used in the instruction in our case is the equivalent of the language used in the *Pfisterer* case, *supra,* and since by the provisions of 47-2004 it was the duty of a driver, having regard to the actual and potential hazards, not to drive his vehicle at a speed greater than was reasonable and prudent, it cannot be said, *under the circumstances here appearing,* that the court committed reversible error." (Last italics ours.)

The instruction is based on the application of a statute, Burns Ind. Stats. Anno., Sect. 47-2004 which provides among other things as follows:

> "Speed regulations (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so restricted as may be necessary to avoid colliding with any person or vehicle or other conveyance on or near or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

Still another statute was then and there in force and effect which provided (Burns' Stats. Anno. 1940 Replacement, Sect. 47-513), as follows:

> "In approaching a pedestrian who is walking or standing upon the traveled part of any highway and not upon a sidewalk and upon approaching an intersecting highway or curve or a corner in a highway where the operators view is obstructed, every person driving or operating a motor vehicle or motor-bicycle shall slow down and give a timely signal with the bell, horn or other device for signalling."

The Supreme Court of Indiana, in the case of *Pfisterer* v. *Key* (1941), 218 Ind. 521, 33 N. E. (2d) 330, stated:

> "The *Martin* v. *Lilly* case was decided before the statute above referred to was enacted by the 1925 Legislature (Burns' Ind. Stat., 1940 replacement, Sect. 47-513), and the duties imposed upon the drivers of motor vehicles by the provisions of that statute were not involved. For that reason the case is not controlling."
>
> "Appellant says that by the use of the words 'constantly observe' the jury was told that appellant must keep his eyes constantly on the roadway while he was driving. Webster defines the verb 'observe' as, to take notice; to be attentive, and the word 'constant' as, continually recurring, regular, steady, and the word 'constantly' as in a constant manner, uniformly, continuously. So the phrase 'constantly observe the highway' would mean literally, to continually or regularly pay attention to the highway. *We think the statute above referred to (47-513) does make it the duty of a driver of an automobile to regularly and continuously pay attention to the highway.* To be sure, looking to the right or to the left to see if another vehicle or any other object was about to come on the highway from either side would be observing the highway. But we can understand how the jury might get a more narrow view from the wording of the instructions, and for that reason we could not approve it as a model instruction." (Our italics.)

The Standard driver in the instant case was required by Section 47-513 of Burns' Ind. Stats. Anno. to slow down and give a signal in approaching a pedestrian and by Section 47-2004 to so restrict his speed as might be necessary to avoid colliding with any vehicle on the highway. If it was necessary for him to regularly and continuously observe the highway ahead of him to comply with Section 47-513, it was equally necessary for him to do so to comply with Section 47-2004. It is obvious that he could not comply with either statute unless he regularly and continuously observed the highway ahead of him.

(b)

The instruction "At the time of the accident in question, the law of Indiana required the speed of every vehicle operated upon the highways of this state to be so restricted as might be necessary to avoid colliding with any person, or vehicle, or other conveyance on or near or entering the highway in compliance with legal requirements and with the duty of all persons to use due care," embodied the words of the statute and was proper.

The above instruction was approved by the trial court, both before and at the time it was given and on the motion for a new trial; it was subsequently screened by the Circuit Court of Appeals in its opinion and under the appellants' petition for a rehearing.

A reading of the instruction discloses that the very words *due care* were employed in the instruction and in the conjunctive sense.

It employs the very language of the statute Burns' Stats. Anno. Section 47-2004 and applies the statute in these words "if you find that the facts and circumstances were such that he should have so restricted his speed in such compli-

ance, then such failure would be negligence as a matter of law."

The instruction as given left the question of fact (speed) a question for the jury which the jury resolved against Standard and Nichols.

We admit that the instruction given in *Schlarb* v. *Henderson*, 211 Ind. 1, 4 N. E. (2) 205, 207, left no question of fact to be determined by the jury.

In the cases, *Schlarb* v. *Henderson* and *Oppel* v. *Ray*, cited by Standard, the statute involved required every motor vehicle operated on a public highway at night to be equipped with two lighted head lamps which should throw sufficient light ahead to render an object or person on the roadway straight ahead visible for a distance of at least 200 feet. The court held that this statute created a mechanical standard for lighting equipment and did not create a standard of care in the operation of such vehicles. The court in the *Oppel* v. *Ray* case said that the standard of care was fixed by the speed statute then in force, namely, Section 47-516 Burns' Ind. Stat. Anno. 1933. After quoting the statute, the court said,

> "This is the measure of care required of the driver of a motor vehicle upon the highway."

The instruction under scrutiny uses the exact wording of Section 47-2004, Burns' Ind. Stats. Anno. (1940 Replacement) which was the speed statute in force at the time of the occurrence in question and which replaced Section 47-516. On the authority of *Oppel* v. *Ray*, Section 47-2004 did create a standard of care for the Standard driver at the time and place of the collision in question and the court, of course, was not in error in quoting it in its instructions.

Standard also cites the case of *Heiny* v. *Pennsylvania R. R. Company*, 221 Ind. 367, 47 North Eastern (2nd) 145, in support of its contention. The statute involved in the

Heiny case required the driver of a truck containing inflammables before crossing a railroad to stop and to ascertain definitely that no train was approaching and was in such close proximity as to create a hazard of a collision. The point decided was the statue only required a driver to exercise reasonable care in ascertaining whether or not a train was approaching, and the mere fact a collision occurred did not necessarily mean that the driver was guilty of contributory negligence as a matter of law. The Court did not overrule or criticize the case of *Pfisterer* v. *Key* and certainly did not hold that it was *not* the duty of a truck driver to regularly and continuously observe the highway ahead of him in order to avoid striking a pedestrian or a vehicle on the highway.

In the case of *Rump* v. *Woods* (1912), 50 Ind. App. 347, 98 N. E. 369, no statute was involved and the wording of no statute was embodied in the instruction. The aspects of the statute Sect. 47-2004, which the Circuit Court of Appeals construed was enacted in 1939, twenty-seven years after the *Rump* v. *Woods* (1912) case was adjudicated.

In the very recent case of *Rentschler* v. *Hall,* ... Ind. App. ..., 69 N. E. (2) 619, at page 633, the Appellate Court of Indiana stated,

> ". . . the violation of a statutory duty ordinarily constitutes negligence *per se,* and not, as in the minority view, that such a violation can amount to only a circumstance to be considered, with the circumstances, on the question of negligence. . . ."

The violation of Section 47-2004, Burns' Stats. Anno. (1940 Replacement) by Standard and Nichols was negligence as a matter of law and in the *Rentschler* v. *Hall* case the court approved an instruction to that effect, page 624.

The court in the *Rentschler* v. *Hall* case cited with approval *Pennsylvania Railroad Co.* v. *Huss,* 96 Ind. App. 71, 180 N. E. 919, wherein the court in construing the

then existing speed statute Sec. 10140, Burns' Supp. 1929, superseded by Section 47-2004 of Burns, stated,

> "It was negligence as a matter of law for Miss Menzel to drive the automobile . . . at such a speed that she could not stop the same within the distance that objects could be seen ahead of it."

This proposition of law has been approved by the courts of the State of Indiana in *C. C. C. and St. L. Ry. Co.* v. *Gillespie* (1930), 96 Ind. App. 535, 173 N. E. 708, and *Pitcairn* v. *Honn* (1941), 109 Ind. App. 428, 32 N. E. (2) 733.

The rule of conduct prescribed by the law of Indiana in the case of *Opple* v. *Ray*, 208 Ind. 450, 195 N. E. 81, is correct, but such rule, "he will see any *dangerous* obstruction" (Our Italics) is not applicable to the instant case for the court in the same case states, page 460:

> "A driver is *bound* to observe the red tail light of a car in front of him, proceeding in the same direction. . . ." (Italics ours.)

The Circuit Court of Appeals recognized the distinction petitioners now claim exists when they stated (R. 296):

> "But the instruction in question provided that the speed of every vehicle should be so restricted, 'in compliance with legal requirements and with the duty of all persons to use due care,' and concluded that 'if you find that the facts and circumstances were such that he should have so restricted his speed in such compliance, then such failure would be negligence as a matter of law.' Thus it is clear that the instruction as given left the question of fact for the jury."

The trial court went further and did instruct the jury as to what care a reasonable and prudent man should use under like or similar circumstances (R. 208), when the court charged as follows:

> "At the time and place of the occurrence in question the driver of the truck of the defendant Standard Oil Company was required to exercise that degree of

care to keep his truck under control which a reasonable and prudent person would exercise under the same or similar circumstances."

The trial court and the Circuit Court of Appeals both recognized the fact that there are no degrees of care in the State of Indiana and the instructions of the trial court were all based on such theory.

Conclusion.

Since only the propriety of two instructions is involved, no question of substance and importance is presented. The Circuit Court of Appeals followed and applied the law of Indiana to the issues involved on this case, resultingly the granting of the writ should be denied.

Respectfully submitted,

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